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Submitted through the Federal eRulemaking portal at  
<http://www.regulations.gov>

Debra A. Carr, Director  
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**Re: OMB Control No. 1250-0003**  
**Comments in Support of OFCCP's Proposed Scheduling and**  
**Compliance Check Letters**

Dear Ms. Carr:

On behalf of the American Civil Liberties Union (ACLU), over half a million members, countless additional activists and supporters, and fifty-three affiliates nationwide, we write to comment in support of the Office of Federal Contract Compliance Programs' (OFCCP) proposal to extend the Office of Management and Budget (OMB) approval of the Non-construction Supply and Service Information Collection.

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## **I. Proposed Changes to Scheduling Letter**

OFCCP's mission under Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans' Readjustment Assistance Act, is to ensure that federal contractors comply with their obligation of non-discrimination in the workplace, as well as to make sure that they promote equal opportunity. OFCCP plays a critical role in ensuring that taxpayer dollars are not used to subsidize employment discrimination in federal contracting.

The ACLU strongly supports the proposed changes and additions to OFCCP's Scheduling Letter and Itemized Listing, which we believe will help the Department of Labor more effectively investigate, detect, and remedy employment discrimination. In addition, by collecting this information at the "desk audit" phase, OFCCP may become aware of compliance problems at an earlier stage and will be better able to focus resources for further evaluation more appropriately. The agency must be equipped with the tools it needs to further its mission, so we commend these additions and discuss below some additional data points that would prove helpful in OFCCP's pivotal role.

### **a. Personnel Policies**

One of the new changes, Proposed Item 8 in the Itemized Listing, which requires contractors to submit copies of their employment leave policies relating to the FMLA, pregnancy leave, and accommodation for religious observance and practices, is important information to review in ensuring that employers are meeting their obligations to not discriminate on the basis of sex or religion. The ACLU supports these important changes, so that OFCCP may have a better understanding of the types of accommodations that are offered employees and a better sense of any omissions in federal contractor policies.

In addition to the collection of these personnel policies, we would also recommend the collection of policies in three additional areas. First, we suggest collecting information about contractors' arbitration policies. Pre-dispute, mandatory arbitration policies have the effect of preventing employees from vindicating their equal employment opportunities in courts, as individual litigants or in class actions. In the class context, such policies may leave OFCCP in the position of having to pursue relief for systemic discrimination, and knowledge of where those policies exist will assist OFCCP in evaluating and directing resources.

Second, we also recommend that OFCCP collect personnel policies regarding adverse employment actions for the disclosure of, or inquiry about, wage information. Many employers can terminate or take other adverse actions against employees who disclose or inquire about their own wages. These pay secrecy policies penalize workers unfairly, make it difficult for employees to determine whether they are paid appropriately, and impede OFCCP's goal of reducing wage gap by masking ongoing wage discrimination.

Third, we recommend the collection of paid family leave policies. The enactment of the FMLA has been a major step toward valuing families and shared caregiving responsibilities, but it is only a first step. Millions of Americans do not have access to the FMLA's protections, and millions more cannot afford to take advantage of them. We believe that OFCCP knowing the existence of paid family leave policies, to the extent they exist in federal contracting, would give OFCCP a better sense of policies that facilitate employees' ability to take advantage of the leave policies which benefit them.

### **b. Employment Activity Data**

Collecting more robust and detailed data will provide OFCCP a better view into the possible factors that may influence personnel decisions. Proposed Item 11 in the Itemized Listing would require employers to submit data on applicants, hires, promotions and terminations by job group *and* job title, rather than just one or the other. These revised requirements provides OFCCP the necessary flexibility to view comparisons within job groups or job titles, which may prove necessary as one category may yield more useful information.

In addition, Proposed Item 11 requires contractors to break down the data by racial subgroups, rather than by just listing minority or non-minority status. Providing more specific racial and ethnic data will enhance OFCCPs ability to perform a more refined analysis of personnel decisions in order to ensure that equal treatment in employment activities.

### **c. Compensation Data**

Proposed Item 12 requires the reporting of compensation data at the employee-level, rather than aggregated data by sex or racial/ethnic group, which adds a level of specificity that makes the process of assessing compliance goals more effective. This level of data will allow OFCCP to have the information necessary to perform a more sophisticated analysis necessary to route out possible discriminatory factors in compensation and benefits packages.

In addition, to supporting the collection of position-level data, the ACLU also supports the expanded definition of compensation, the addition of information from non-full time positions (part time, temporary, etc), and the submission of documentation that explains the factors used to determine compensation. Collecting information about all forms of compensation, including bonuses, incentives, commissions, merit increases, locality pay and overtime, all help to enforce pay equity goals, while also helping to eliminate hidden points of salary discrimination not otherwise shown in base salaries. And requiring contractors to submit factors used in determining compensation will help OFCCP assess whether pay disparities reflect unlawful bias or legitimate business factors such as seniority or other job-related education and experience.

In February 2011, OFCCP issued an Advance Notice of Proposed Rulemaking regarding a compensation data collection tool. OFCCP should continue to develop such a tool. Like the proposed changes to the Scheduling Letter, we would support such a tool also including the enhanced definition of compensation and other types of changes contemplated in Proposed Item 12 discussed above. However, while this information is critical to ferret out pay discrimination, we also continue to believe that more than compensation information is needed in order for OFCCP to ensure compliance with all the anti-discrimination laws under its mandate. Such information should include, for example, data about applicants, hires, promotions, and terminations, among other data points.

## **II. Proposed Changes to Compliance Check Letter**

Currently, OFCCP's compliance check process consists of a brief on-site review to make sure that certain records are being maintained by federal contractors. We support your continued efforts of reviewing affirmative action plans for the preceding year; examples of job advertisements and listings, and examples of accommodations made to persons with disabilities. We support your proposal to give contractors the options of arranging for an on-site review or proving the information by mail. The proposed changes will streamline the process for contractors, without diminishing OFCCP's enforcement efforts.

## **III. Conclusion**

The ACLU appreciates this opportunity to submit comments on OFCCP's compliance review process. We believe OFCCP's mission to ensure equal employment opportunity in federal contracting is critical and the agency must be equipped with the tools and information it needs to carry out this important mission.

Please feel free to contact Deborah J. Vagins, ACLU Senior Legislative Counsel, at [dvagins@dcaclu.org](mailto:dvagins@dcaclu.org) or (202) 715-0816 with any questions.

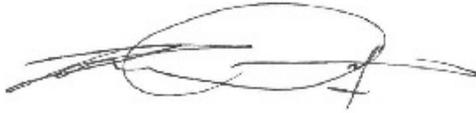
Sincerely,



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Director, Washington Legislative Office



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